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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL PRODUCING CO. INC., a corporation, and GEORGE A. HAMID,

Petitioners,

v.

FARRIS O. ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals, not yet reported, is contained in the Appendix to the Petition for writ of certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on April 1, 1958. The petition for a writ of certiorari was filed on May 16th, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

First: Did the District Court during the trial of the case err in refusing to permit these petitioners, the defendants below, to amend their answer to plead an affirmative defense?

Second: Was there evidence to support a verdict against the individual defendant Hamid?

Reference Note

All folios cited in this brief are those contained in petitioners' appendix submitted to the Court of Appeals and now on file in this case in this Honorable Court.

Statement of the Case

On May 6, 1952 while plaintiff was performing in the Hamid-Morton Circus at the Shrine Temple in Altoona, Pennsylvania, she fell owing to the negligence of the defendants (petitioners here) and suffered most serious injuries. This Shrine Temple was occupied and controlled by the Shrine which is in no way involved in this litigation. Her spine was broken in two places, her pelvis was broken in two places, and both heel bones were broken. These injuries are permanent and prevent her from ever again pursuing the only line of work which she knows and for which she was trained.

According to the statement of defendants' witness, Butler (Defendants' Exhibit D in evidence), the aerial rigging from which plaintiff fell was set up by the riggers of "The Hamid-Morton Circus". The negligence is made crystal clear by this witness, Butler, who states as follows:

> "I looked at the hand loop immediately following the accident and found that there was no safety loop

there. When Miss Anderson noticed that the safety loop was not there and started to come down, the rigging jerked, which threw her out of the rigging and she fell to the ground. If the safety loop had been there this jerk would not have caused her to fall. In my opinion, therefore, the accident was entirely attributable to the absence of the safety loop."

(Certified exhibit submitted herewith.)

The plaintiff obtained a unanimous verdict which was approved by the trial judge in these words, "I must say that the evidence amply supports your verdict" (fols. 1640-1641). The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court and thereafter unanimously denied petitioners' application to stay the issuance of its mandate pending application for writ of certiorari.

ARGUMENT

POINT I

The trial court did not err in refusing to permit these petitioners, the defendants below, to amend their answer to plead an affirmative defense.

The petitioners herein appear to misconceive the basis for the ruling of the trial court. On June 4, 1957, the defendants for the first time moved at the trial to amend the answer (fol. 965). At that point the trial had been in progress eight days, i.e., since May 27, 1957 (fol. 4). The case had then been pending for four years, the answer had been filed for almost four years (fol. 2) and the pre-trial hearing had been held. Thus, at that late date, after all depositions had been taken, and after the close of plaintiff's case, and after plaintiff had rested (fol. 928), counsel for defendants moved for the first time to amend the answer "to set forth the statutory law in effect in

Pennsylvania, at the time of this mishap, and that consists of Sec. 203 of the Pennsylvania Workmen's Compensation Act" (fols. 940-942). No proposed written amended answer was offered. The motion was denied by the trial judge (fol. 965). From the Pennsylvania Workmen's Compensation Act, Section 203, set forth in full at the top of page 3 of petitioners' brief herein, petitioners argue that the compensation law of Pennsylvania afforded the exclusive and sole remedy available to plaintiff and that therefore plaintiff's case at common law in negligence must be dismissed.

The petitioners misconceive the ruling below in asserting that the trial judge and the Court of Appeals refused to take judicial notice of the Pennsylvania statute. Such was not the question at all. The question very simply was whether or not "matter constituting an avoidance" such as this could be proven under a general denial, which was defendants' only plea, or whether such matter must under Rule 8(c) of the Federal Rules of Civil Procedure be set forth as an affirmative defense. From time immemorial, affirmative defenses such as this could not be availed of under a general denial but must be pleaded. Such is still the law, under Rule 8(c) of the Rules of Federal Procedure. Thus, for example, if a defendant in a Court of the United States wishes to rely upon the Statute of Frauds as a defense, the facts making such a defense applicable must be affirmatively pleaded by the defendant, and that is so regardless of whether he is relying upon the Statute of Frauds in force under the law of the state of the forum, or in force under the law of some other state. It is, of course, obvious that just because the statutory affirmative defense arises under the law of another jurisdiction rather than under the law of the forum, the defendant is not thereby relieved from the obligation to set up such statute as an affirmative defense on the ground that the court must take judicial notice of the statute of another state.

The defendants had no right to amend as of course, but only by leave granted in the discretion of the trial court.

There is no claim here that the court abused its discretion.

As was stated by Judge Rifkind in *Schick* v. *Finch*, 8 Fed. Rules Dec. 639 (U. S. Dist. Ct. S. D. of N. Y.) at page 640:

> "Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.A. prescribes a liberal policy in granting leave to amend. A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. The instant case, I believe, falls into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendants' knowledge when the controversy arose."

This was not a situation where defendants sought to amend in order to plead newly discovered evidence. All the facts pertaining to the affirmative defense which defendants sought to plead at such a late date were within defendants' knowledge at the very inception of the litigation and, indeed, from the time the cause of action arose.

In *Blair* v. *U. S.*, 147 Fed. 2d 840, modified on other grounds, 150 Fed. 2d 676: "At the beginning of the trial on October 11, 1943, counsel for defendants asked leave to amend the answer so as to plead" an offset to plaintiff's claim (p. 842 of the opinion). An application to amend the answer was denied and on appeal the Court of Appeals said at page 843:

> "Before amendment defendant's answer did not suggest a liability on the part of plaintiffs for liqui-

dated damages on account of delay. Such an allegation would undoubtedly raise new questions, both of law and fact. The action was commenced March 3, 1943. Answer was filed July 15, 1943, 3 months before the trial began. In these circumstances the trial court might well have concluded that it would be unfair to permit the amendment and force plaintiffs to trial on the new issue thus tendered. The application was addressed to the judicial discretion of the Court and in the absence of an abuse of such discretion the ruling will not be reversed on appeal (citing cases). There was here no abuse of discretion."

Of course defendants were not at liberty to prove such an affirmative defense under mere denials. A situation identical to that presented on this appeal is found in the case of *Clark* v. *Monarch Engineering Company*, 248 N. Y. 107. There as here the plaintiff had sued at common law for negligence. The defendant there as here had attempted to invoke the Workmen's Compensation Act as a bar to the suit, citing the section of the New York law similar to that of the Pennsylvania Act. The Court, however, held that it was up to the defendant to plead and prove that the plaintiff's remedy lay exclusively under the Workmen's Compensation Law. At pages 111 and 112 of the opinion by Judge Lehman, we find the following:

"Where, however, the general contractor asserts that he is relieved of a common-law liability because the statute (i.e. Workmen's Comp. Law) has imposed upon him a new liability in its place and stead, he should at least plead and prove that he is in fact under the statutory liability. * * * It seems to us quite clear that the Legislature did not intend to provide exemption to the general contractor from common-law liability, at least where no statutory liability is shown to have arisen."

Alexander v. *Alexander*, 140 Fed. Sup. 925, was a suit by a wife against her husband on account of a tort committed in Florida. The trial was in the South Carolina District Court. The defendant moved to amend the answer to plead that under the Florida law a wife cannot sue her husband in tort. The Court denied the application to amend the answer and stated at page 930:

> "Rule 8(c), Federal Rules of Civil Procedure, requires a defense of this character, that is one 'in avoidance' to be affirmatively plead. (Citing case) Rule 12(h), Federal Rules of Civil Procedure, provides that a failure to plead a defense of this character constitutes a waiver of his right to do so."

Throughout the trial the case proceeded on the theory of common law negligence and not on that of Workmen's Compensation. Indeed, as shown by Defendants' Exhibit B, which is a purported contract between the National Producing Co. Inc. and Peaches O'Neill, for the performance of this act, it is specifically and clearly provided in clause SIXTH that "Workmen's Compensation laws of any state, territory or country" are not to apply and that Peaches O'Neill and the girls in her act, including the plaintiff, are all independent contractors and not subject to such statutes. It will be noted that this contract (certified exhibit submitted herewith) is on a printed form of George A. Hamid & Son, 10 Rockefeller Plaza, New York 20, N. Y. (George A. Hamid being a defendant herein).

As was stated in *Waurzonek* v. *Central Hudson Corporation*, 276 N. Y. 412, at page 420:

> "When a party, with meticulous care, enters into a contract which purports to establish a relationship which enables it to escape the burden of paying increased Workmen's Compensation premiums based upon its actual operations, it does not lie in the mouth

> of that party to claim that what it did was not intended to and did not set up the relationship and thus escape the disadvantageous consequences of its actions."

The Supreme Court of Pennsylvania adopts the same view as the New York Court of Appeals in such situations and with regard to the very Pennsylvania statute in question said:

> "This appeal by McDonald presents an oft recurring difficulty. On the one hand we have persons before us, such as Levinson (defendant), endeavoring to escape the effect of the Compensation Act so that they will not be compelled to pay compensation or carry insurance, and, on the other hand, as here, when faced with liability at common law, they strive vigorously to come under the sheltering protection of the act. Appellee is now endeavoring to do the latter as a statutory employer." *McDonald* v. *Levinson Steel Co.*, 302 Pa. 287, at page 292.

The Pennsylvania court then went on to hold, as did the New York court, that the defendant was not a statutory employer and could not avail itself of the shelter of exclusive remedy under the Workmen's Compensation Law.

On a motion to amend a pleading the Court will consider the legal sufficiency of a new defense sought to be added. *Canister Company* v. *National Can Corporation*, 71 Fed. Sup. 45; appeal dismissed, 163 Fed. 2d 683.

Section 203 of the Workmen's Compensation Law, above quoted, by its very terms does not purport to apply to a situation such as this. It is obviously intended to pertain to the erection or construction of a building by a general contractor who retains subcontractors to do part of the work, and in such a situation "laborers" of the subcontractor would be deemed employed by the principal con-

tractor for the purposes of Workmen's Compensation. It is difficult to see how this twenty-one year old girl aerialist in a circus can be deemed a "laborer". Obviously that statute was not intended to govern such a situation. That the word "laborer" is not equivalent to "employee" is manifest from a reading of the statute itself, above quoted, since the statute uses both terms, i.e., "laborer" and "employee". They are obviously not intended to be synonymous.

> "It is one of the accepted canons of construction that statutes must be read so that each word will have a meaning, and not so read that one word will cancel out and render meaningless another; that each word used in an enumeration in a statute of several classes or things must be presumed to have been used to express a distinct and different idea; that every provision of a statute was intended to serve some useful purpose." *Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286, at page 293.

Moreover the Pennsylvania statute relied upon by appellants and quoted above can have no application because the premises were not "occupied or under the control" of appellants. The "premises" were the property of the Altoona shrine organization which before, during and after the circus continued to "occupy" and "control" the "premises". The shrine sold the tickets (fol. 734). The defendants' witness Rowzer testified that he was "Provost Guard" of the temple at the time of the circus and had the responsibility of policing and security on behalf of the temple (fol. 417). Publicity, obtaining local help and sale of tickets were all under the control of the temple and not of appellants (fol. 737). Appellants did not rent the building and thus did not "occupy" or "control" the building under a lease (fol. 737). According to appellants' own witnesses it is not possible to see how they could be deemed to "occupy" or "control" "the premises" within

the purview of the statute. Of course the circus was in the building at the time, but so were the spectators who no more "occupied" or "controlled" the premises within the intendment of the statute than the circus.

Furthermore, it would seem clear here that the plaintiff was an independent contractor and not the employee of anyone. Those who engage acrobats or aerialists have no desire to control the manner and method of performing the work. That is left to the performer or entertainer. Appellant Hamid testified that he did not exercise any control over the girls in plaintiff's act (fol. 1350). The essential element of the relationship between master and servant is therefore lacking and Workmen's Compensation does not apply.

Since under the Pennsylvania Workmen's Compensation Act (77 Purdon's Pennsylvania Statutes, Section 631) notice of a compensation claim must be filed within 120 days of the injury, which was not done, plaintiff would be left without any remedy whatever for the grave, crippling and lifelong permanent injuries she has suffered if this were held to be a compensation case. In justice and fairness appellants are now estopped from making any such contention.

Never at any time did defendants offer to prove that they had considered this as a compensation case and had filed the accident report required from the employer within fifteen days of the injury pursuant to Title 43, Chapter 1, Section 12 of Purdon's Pennsylvania Statutes. Quite the contrary the defendants, as is shown by their Exhibit B above referred to, treated performers as independent contractors not subject to Workmen's Compensation right up until the point on the trial where they sought to amend and escape common law liability after having escaped compensation liability.

The trial court very properly refused to take cognizance of a law which was not applicable to the issues as pre-

sented by the pleadings. As the trial court said (fol. 965), "I think it is unnecessary to take judicial notice in lieu (sic) of that".

Under this issue there is no conflict in the decisions of the circuits, as contended by petitioners. Indeed, petitioners' own brief, citing *Slattery* v. *Marra Brothers, Inc.*, 186 Fed. 2d 134 (C. A. 2), cert. denied, 341 U. S. 915; *In Re Paramount Publix Corp.*, 85 Fed 2d 83 (C. A. 2); *Zell* v. *American Seating Company*, 138 Fed. 2d 641 (C. A. 2), shows that the Court of Appeals for the Second Circuit is well aware of, and follows, the rule that a Federal court takes judicial notice of the law of another state. Here such rule was not applicable. The issue before the trial court and before the Court of Appeals was a very simple one, namely, whether or not at a very late date in the trial, the defendants could, as a matter of right, prove the Pennsylvania law with respect to an affirmative defense which had not been pleaded, and which was in no event pertinent. Nor did the courts below come into conflict with any applicable decision of this Court. Indeed the courts below followed Rule 8(c) of the Federal Rules of Civil Procedure, which rules were prescribed by this Court. The petitioners have shown no ground whatever under Rule 19 of the Rules of this Court for granting a writ of certiorari.

POINT II

There was ample evidence to support a verdict against the defendant Hamid and there were no errors of law which should be reviewed on certiorari.

Commencing at page 9 of petitioners' brief, it is claimed that there are "other errors of law which should be reviewed on certiorari."

A complete answer to petitioners' contention in this regard is contained in the opinion of the Court of Ap-

peals, which is printed in full as an appendix to the petition herein. There is no need, therefore, to burden this Court by belaboring the point.

Furthermore, the errors alleged by the petitioners are not such as justify a review by this Court on writ of certiorari or otherwise. None of the grounds for granting a writ of certiorari prescribed by this Court in its Rule 19 are even alleged to exist by petitioners. The matter was correctly and justly decided by the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

May, 1958.

Respectfully submitted,

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